No. 600

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE UNDER WILLS OF R. J. REYNOLDS AND KATHERINE S. JOHNSTON, AND DEED OF KATHERINE S. JOHNSTON AND DECREE OF SUPERIOR COURT FOR FORSYTH COUNTY, N. C., ETC., AND ESTATE OF ZACHARY SMITH REYNOLDS, DECEASED, ESTATES ADMINISTRATION, INC., ADMINISTRATOR, D. B. N.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled causes on June 10, 1941.

OPINIONS BELOW

The findings and opinion of the Board of Tax Appeals (R. 1–46) are reported at 42 B. T. A. 145. The opinion of the Circuit Court of Appeals (R. —) is reported at 121 F. (2) 307.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 10, 1941 (R. —). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Decedent was the beneficiary of three trusts created by his parents. During the decedent's life, the income of each trust was either to be paid to him or to be accumulated. At his death, the property was to go to the person or persons to whom the decedent, in his sole discretion, might appoint by will. In default of appointment, the property of each trust was to go to his descendants or, if none, to his brother and sisters. Under the terms of one of the trusts, decedent was to receive the corpus outright upon attaining the age of 28. Decedent died at the age of 20 without having validly exercised his powers of appointment. Did the decedent at the time of his death have such an "interest" in the trust property as to require its inclusion in his gross estate under Section 302 (a) of the Revenue Act of 1926?

2. The decedent left a will by which he sought to appoint the trust property to his brother and sisters. The validity of the will was challenged and the will has never been probated. The decedent's brother and sisters, asserting a right to take as appointees under the will as well as a right to take under the gift-over provisions of the trusts if the will was invalid, obtained a substantial share of the trust property pursuant to a judicially approved compromise. Is all or any part of the amount obtained by the brother and sisters in settlement to be considered as having passed under exercised powers of appointment and therefore includible in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * *
>
> (f) [as amended by Section 803, Revenue Act of 1932, 47 Stat. 169] To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed

executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

* * * * *

(U. S. C., Title 26, Sec. 411.)

The applicable Treasury Regulations will be found in the Appendix, *infra*, pp. 23–24.

STATEMENT

The facts, insofar as relevant to the two issues raised in the court below and presented by this petition,[1] are not in dispute. They may be summarized as follows:

1. *Facts with respect to the first issue.*—Decedent was the beneficiary of three trusts, one created under the will of his father in 1918, one

[1] Many contentions which the Government advanced before the Board, and which are discussed in the Board's opinion (R. 17–46), were abandoned in the court below. In that court, the Government pressed only the two questions with respect to which writs of certiorari are now sought (R. —).

created by deed of trust executed by his mother in 1923, and one created by will of his mother in 1924. Under the trust created by his father, decedent was to receive only a portion of the income until he reached the age of 28, the remainder of the income to be added to the corpus of the trust. Upon attaining the age of 28, he was to receive the trust property outright, together with all accumulated income. Under the trusts created by his mother, decedent was to enjoy the income of the property for life, with certain restrictions as to the payment of income to him before he attained the age of 28. Any income not paid to him or for his benefit before he reached 28 was to be added to the *corpora* of the trusts. No one other than decedent had any right to or interest in any of the trust income during decedent's life. (R. 3–7; Supp. 310–311, 342–343, 354.)[2]

In the case of all three trusts, decedent was given a general power of appointment over the trust property, exercisable by will in favor of any person or persons he might in his sole discretion select. In default of the exercise of the power of appointment, the trust property was to go to decedent's descendants, if any, or if he had no descendants to his brother and sisters and their issue *per stirpes*. (R. 3–7.)

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[2] The reference to "Supp." is to a bound volume of the record and proceedings in the case of *Reynolds* v. *Reynolds*, 208 N. C. 578. This bound volume forms part of the record in the present case and has been filed with the Clerk of this Court.

Decedent died on July 6, 1932, about four months before he would have attained the age of 21. He was domiciled in North Carolina and, under the laws of that state, was incapable of disposing of property by will because of his minority. (R. 7, 31.)

2. *Additional facts with respect to the second issue.*—Decedent was twice married, first, to Anne Cannon and thereafter to Libby Holman. He left surviving him a child by the first marriage, Anna Cannon Reynolds II, and a posthumous child by the second marriage. (R. 9, 10, 12.)

After decedent had been separated from his first wife, he entered into a settlement with her, by which trust funds of $500,000 each were set up for the wife and child. The judgment embodying this settlement barred the wife and child from making any further claims for financial support against the decedent and from any participation in the trust property. Subsequently, on November 23, 1931, Anne Cannon Reynolds obtained a divorce at Reno, Nevada. Six days later decedent married Libby Holman. (R. 9–10.)

A few months before his divorce, decedent, while temporarily staying in New York, executed a purported will with three witnesses, in which he attempted to exercise his powers of appointment in favor of his brother and sisters. In this will, decedent declared that he had adopted and acquired a domicile in New York and that he intended to make it his permanent home. (R. 10.)

After decedent's death, claims were asserted to the trust property by the Cannon child, by the Holman child, and by the decedent's brother and sisters (R. 12–15). The validity of the decedent's divorce from Anne Cannon, the validity of the judgment barring Anne Cannon and her child from participation in the trust property, and the validity of the New York will were all contested issues (R. 12–13). Decedent's brother and sisters urged that they were entitled to the trust property because the New York will was valid and in that will decedent had exercised his powers of appointment in their favor.[2] They further urged that, even if the New York will was invalid, they were entitled to the trust property under the gift-over provisions of the trusts. This contention was based on the theory that the Cannon child was excluded from taking because of the judgment embodying the settlement and that the Holman child was excluded from taking because decedent's divorce from Anne Cannon was invalid and the Holman child therefore illegitimate (R. 13).

Extensive litigation ensued in the North Carolina state courts to determine the validity of the various claims to the trust property. See *In Re Reynolds*, 206 N. C. 276; *Reynolds* v. *Reynolds*, 208 N. C. 578. A compromise was finally reached

[2] Evidence that this contention was made is contained in the opinion of the Supreme Court of North Carolina approving the compromise. *Reynolds* v. *Reynolds*, 208 N. C. 578, 618, 630; Supp. 770, 787.

under which, after the payment of $2,000,000 to the State of North Carolina in compromise of its claim for inheritance taxes, 37½ percent of the remainder was allotted to Anne Cannon Reynolds, II, 25 percent was allotted to the Holman child, and 37½ percent was allotted to the brother and sisters of the decedent to be held in trust for them pursuant to the terms of their father's will; $750,000 was paid to the brother and sisters to be turned over to Libby Holman. (R. 13–15.) The North Carolina Superior Court confirmed the compromise and its judgment was affirmed by the North Carolina Supreme Court. *Reynolds* v. *Reynolds*, *supra*.

The Safe Deposit & Trust Company of Baltimore, trustee of each of the trusts, had instituted equity proceedings in the Circuit Court of Baltimore City, seeking protection with respect to any distribution of the trust property. After all interested parties, including the executor named in the New York will, had been brought in, that court entered a decree affirming the compromise which the North Carolina court had approved and directing that it be carried out. The executor named in the New York will subsequently was discharged from any duty to probate the will in New York or defend it in the Maryland proceedings (R. 16).

3. *Action of the Commissioner.*—The estate tax return filed on behalf of decedent's estate did not

include any part of the trust property in the gross estate. The Commissioner determined that the entire value of the trust property should be included and accordingly assessed a deficiency in estate tax of $8,520,820.55, less any credit for inheritance taxes paid to the State of North Carolina (R. 2).[4] The Board of Tax Appeals held this action of the Commissioner to be erroneous (R. 47). The Commissioner appealed, limiting his appeal to the two questions on which review by this Court is sought. The court below rejected the Government's contentions on both issues and affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that decedent did not have an interest in the corpus of each of the trusts created for him by his parents which was taxable as part of his gross estate under Section 302 (a) of the Revenue Act of 1926.

2. In holding that no part of the corpus of the trusts should be included in gross estate under Section 302 (f) of the Revenue Act of 1926, as amended, as having in effect passed under a power of appointment exercised by decedent.

3. In affirming the decision of the Board of Tax Appeals.

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[4] Since $2,000,000 was paid to the State of North Carolina for inheritance taxes, the principal amount of the deficiency is approximately $6,520,000, with interest to date of approximately $3,155,000, or a total of approximately $9,675,000.

REASONS FOR GRANTING THE WRIT.

1. The present case is one of large importance in the administration of the revenue laws. Although the litigation is unusual because of the sizable amount of the taxes at stake (approximately $9,675,000), the importance of the case derives more particularly from the similarity of the Reynolds trusts to innumerable other trusts, in which property of incalculable value has been placed, the taxability of which will be affected by the decision here.

The outstanding characteristic of the Reynolds trusts for present purposes is that they combine a life estate,[5] a testamentary power of disposition in the life beneficiary, and a gift-over provision in favor of the life beneficiary's children and next of kin in the event of non-exercise of the power of appointment. Trust provisions of this type are in constant use. They are designed to confer upon the life beneficiary all the substantial attributes of ownership of the trust property, except the power of alienation during his lifetime, while still withholding from him technical legal title to the property.

The court below held that this device successfully avoids the impact of the estate tax law. The

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[5] One of the trusts was to terminate when the decedent reached the age of 28, at which time he was to be given the corpus outright. Under the provisions of this trust, the decedent had more than a life estate; he had in effect ownership of the property, possession merely being postponed until he reached 28.

court reasoned that Congress, in enacting Section 302 (a) of the Revenue Act of 1926, intended to tax only the devolution of legal estates in property, that decedent's various rights in and to the trust corpora, however substantial and however similar to the rights of ownership, did not confer legal title upon the decedent, and that therefore the decedent could not be considered as having an "interest" in the property within the meaning of Section 302 (a).

The effect of this decision, with its emphasis upon technical considerations of property law rather than upon the substance of decedent's rights, is to sanction a method by which ownership benefits can be enjoyed by a decedent during his life without the imposition of corresponding estate tax obligations upon his death. Unless reversed by this Court, the decision will have a far-reaching effect upon the revenues, since it will remove from the scope of the estate tax all property subject to trusts of this kind, when the power of appointment is not exercised, irrespective of the nature and extent of the decedent's actual control over the property. A construction of a basic provision of the estate tax law which has such results should, we believe, be reviewed by this Court.

2. This is the first case in which the Government has sought to apply Section 302 (a) to a trust of the type here involved. There is, there-

fore, no direct conflict between the decision of the court below and any decision of this Court or of any other circuit court of appeals. But the construction which the court below placed upon Section 302 (a), and the method of reasoning by which it sought to justify that construction, are so squarely opposed in theory to many recent decisions of this Court in analogous situations as to justify the assertion that a conflict in principle exists.

There can be no dispute that decedent in this case had almost all the substantial attributes of ownership of the trust property. All the income was either to be paid to him currently or accumulated; upon attaining the age of 28 he would receive the corpus of one trust outright and beginning then and continuing for the rest of his life he would receive the entire income of the other two. At the moment of his death he possessed a general power to dispose of the trust property and all accumulated income to whomsoever he chose, including his own estate or creditors. If he failed to exercise the power, the property would pass to his next of kin—his children for whom it was his moral obligation to provide, or, if none, his brother and sisters. It is apparent, therefore, that decedent, to the exclusion of all other persons, could enjoy the fruits of the trust properties and dispose of their substance at his death. His

position differed from that of an absolute fee owner only in that his ownership was subject to spendthrift provisions—restraints on alienation during his first 28 years (or, as to two trusts, during his life), and partial limitations on enjoyment of the income during his first 28 years. But at the moment of his death decedent's situation could not be distinguished from that of a legal fee owner, for his unlimited power of disposition at that moment gave him all the rights which a holder of an absolute fee title would have had.

The question before the court below was whether these substantial attributes of ownership which decedent possessed constituted an "interest" in the property "at the time of his death" within the meaning of Section 302 (a). The court answered this question in the negative, not on the ground the decedent's rights in and to the property were substantially less than those of a fee owner, but on the ground that the term "interest" refers to a technical common-law estate in property and that decedent had no such estate. The court made no attempt to show why Congress would have wanted to draw a distinction for tax purposes between an owner of property and a person having the same rights of enjoyment and disposition as an owner, although not his legal title. In the view of the court, it was decisive that no single one of the decedent's rights, considered separately, amounted to a common-law estate.

The approach thus taken by the court below is irreconcilable in several respects with recent rulings of this Court. In the first place, the refusal of the court to regard the "bundle of rights" which the decedent had in the property as a whole, and its emphasis instead upon the characteristics of each of the rights separately, is directly contrary to the approach taken by this Court in *Helvering* v. *Clifford*, 309 U. S. 331, where the grantor of a short-term trust, of which the grantor's wife was beneficiary, was held to be taxable on the trust income because of the many attributes of ownership which he had retained. The Court specifically pointed out that "no one fact is normally decisive" and "that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership * * *." 309 U. S. at 336.

In the second place, and of more importance, the court below completely disregarded the fundamental rule enunciated by this Court in the *Clifford* and many other cases[*] that one who is substantially the owner of property is to be treated as its owner for tax purposes, even though

[*] *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, 312 U. S. 579; *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42–43; *Burnet* v. *Guggenheim*, 288 U. S. 280, 283; *Burnet* v. *Wells*, 289 U. S. 670; *Chase National Bank* v. *United States*, 278 U. S. 327, 338.

he may not have legal title thereto. This rule is based on the unassailable assumption that Congress, in enacting the revenue laws, intends tax consequences to depend upon the substance of things and not upon the "niceties of the law of trusts and conveyances." *Helvering* v. *Clifford, supra,* at 334. The premise upon which the court below proceeded, however, was precisely the reverse: it assumed that Congress referred in Section 302 (a) only to a technical common-law estate and accordingly considered irrelevant the substantiality of decedent's rights of enjoyment in and powers of disposition of the trust property.

Had the court below followed the mandate of this Court to look to the substance of things, its ruling would, we believe, necessarily have been different. This Court has frequently stated that "for purposes of taxation, a general power of appointment * * * [is] equivalent to ownership of the property subject to the power" (*Curry* v. *McCanless,* 307 U. S. 357, 371, and cases cited; *Graves* v. *Elliott,* 307 U. S. 383, 386), and that "to make a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630. Further, the Court has specifically pointed out that "the non-exercise of the power may be as much a disposi-

tion of property testamentary in nature as would be its exercise at death." *Chase National Bank* v. *United States, supra,* at 338.[7]

Under these authorities, it is entirely plain that decedent "at the time of his death" had an "interest" in the trust property equivalent in all but legal formalism to that of an owner in fee. And under the *Clifford* and similar cases, such an interest requires that the decedent be treated, for tax purposes, as though he were in fact the owner. The failure of the court below so to regard him cannot, we believe, be harmonized with the decisions which we have cited.

Nothing in the structure, judicial interpretation,

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[7] Although taxpayer, who died at the age of twenty years and eight months, was prevented by Section 4128, North Carolina Code (1931), from passing property by will until he reached twenty-one, his disability was not different than it would have been if he had owned the property absolutely. The limitation was not one inhering in decedent's basic power over the property at the moment of death, but was one superimposed by the law of the state which happened to be his domicile at death. See Restatement of the Law of Conflict of Laws, Section 287; Beale, Conflict of Laws (1935 Ed.), Vol. 2, Section 287.1, pp. 1010–1011. An appropriate change in the North Carolina law or removal of domicile to a state permitting a valid will at an earlier age could have overcome the obstacle of decedent's disposition by will. In more than half of the states a married male of eighteen or over can make a valid will of personalty; in some states ages ranging down to fourteen are sufficient. Schouler, *Wills, Executors, and Administrators* (6th ed.), Vol. 1, Section 77.

or legislative history of the estate-tax law justified the court below in departing from the principles of construction enunciated by this Court. *United States* v. *Field*, 255 U. S. 257, the principal authority upon which the court below relied, interpreted Section 202 (a) of the Revenue Act of 1916 which described only an interest of the decedent—

> which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate. (255 U. S. at 262.)

The court below was apparently unmoved by the significant fact that the quoted words were deleted by Section 302 (a) of the 1926 Act, which is the provision here applicable. The court below was also influenced by the partial overlapping between Section 302 (a) and Section 302 (f) of the 1926 Act, which would result from the construction which we urge. But this Court has frequently refused to limit the scope of a general provision in a tax statute simply because of the subsequent addition of a specific provision covering part of the same ground. *Helvering* v. *Clifford*, 309 U. S. 331; *Higgins* v. *Smith*, 308 U. S. 473; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Burnet* v. *Guggenheim*, 288 U. S. 280; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 45

note.[8] The provision which is Section 302 (a) of the 1926 Act first appeared in 1916 (Section 202 (a) of the 1916 Act); the provision which is Section 302 (f) of the 1926 Act first appeared in 1918 (Section 402 (e) of the 1918 Act) and, in the words of the Committee report, was added to the law "for the purpose of clarifying rather than extending the existing statute." H. Rept. No. 767, 65th Cong., 2d sess., p. 21. It will be noted, too, that in 1926, after the addition of this "clarifying" specific provision, Section 302 (a), the basic provision, was considerably broadened by the deletion of the qualifying words which are quoted above and which formed the principal basis of the *Field* decision. This broadening of the general provision some years after the introduction of the specific one is an especially strong reason why the construction of the general provision should not be affected by the existence of the specific one.[9]

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[8] Cf. *Douglas* v. *Willcuts*, 296 U. S. 1, 10; *White* v. *Higgins*, 116 F. (2d) 312 (C. C. A. 1); *McCauley* v. *Commissioner*, 44 F. (2d) 919, 920 (C. C. A. 5); *O'Donnell* v. *Commissioner*, 64 F. (2d) 634, 635 (C. C. A. 9), certiorari denied, 290 U. S. 699.

[9] The court below was also influenced by cases like *Helvering* v. *Grinnell*, 294 U. S. 153; *Morgan* v. *Commissioner*, 309 U. S. 78; *Legg's Estate* v. *Commissioner*, 114 F. (2d) 760 (C. C. A. 4); and *Rothensies* v. *Fidelity-Philadelphia Trust Co.*, 112 F. (2d) 758 (C. C. A. 3). But these cases are not precedents in any way decisive of the present controversy concerning the proper construction of Section 302 (a), since they interpreted only Section 302 (f) and the present ques-

3. As an alternative to his contention that the entire corpus of each trust should be included in decedent's gross estate under Section 302 (a), the Commissioner urged in the court below that all or some part of the 37½ percent of the trust property allotted to decedent's brother and sisters in the compromise should be included in gross estate under Section 302 (f) as property passing pursuant to an exercised power of appointment. The basis of the contention was that decedent, in his New York will, had sought to exercise his powers of appointment in favor of his brother and sisters and that the brother and sisters had received a share of the trust property in the compromise, in part at least by asserting their rights as appointees under that will. The decision below rejecting this argument is, we believe, in conflict with the decision of this Court in *Lyeth* v. *Hoey*, 305 U. S. 188.

In the *Lyeth* case, an heir of a decedent contested the validity of the decedent's will in which no provision had been made for him. A compromise was entered into under which the will was probated and a specified sum paid to the heir.

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tion was not there raised or considered. *Webster* v. *Fall*, 266 U. S. 507, 511; *Bingham* v. *United States*, 296 U. S. 211, 218; *United States* v. *Mitchell*, 271 U. S. 9, 14. Mere failure to raise the question in those cases is not sufficient evidence of an administrative practice to be of any substantial weight in settling the present controversy. Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39.

This Court held that the heir had acquired the property "by inheritance" because he acquired it by virtue of his claim as heir. The theory of the decision was that a person who had no standing to make a claim except as heir, and who acquired property by asserting that claim, must be considered as acquiring the property for tax purposes in his capacity as heir. Similarly here, so much of what the brother and sisters obtained in the compromise by asserting their claim as appointees under decedent's will would seem, for tax purposes, to come to them as such appointees and therefore to have passed pursuant to an exercised power of appointment within the meaning of Section 302 (f).

The court below attempted to avoid the doctrine of *Lyeth* v. *Hoey* by determining (1) that the New York will was void; (2) that, since the will was void, nothing could have passed pursuant to the exercise of the powers of appointment in the will; and (3) that the compromise in fact repudiated rather than recognized the right to take by appointment. This approach, we believe, is a complete distortion of the *Lyeth* v. *Hoey* rule.

The brother and sisters asserted the validity of the will and their rights as appointees under the will in the North Carolina proceedings. Had they succeeded in their contention, they would have been entitled to the entire trust property; had their contention been rejected, and their alternative contention rejected as well, they would

have received nothing. They preferred, as did the other parties to the proceeding, to compromise their claim rather than litigate it in the North Carolina courts. Certainly, in this situation, it is not for the federal court considering the tax consequences of the compromise to determine, as did the court below, that one of the contentions compromised was without merit and therefore could not have contributed to the settlement. Under the doctrine of *Lyeth* v. *Hoey*, the brother and sisters, having claimed, in part at least, as appointees, and having acquired trust property by virtue of that claim, must be considered as taking as appointees even though the appointment now be deemed invalid.

The view expressed in the opinion below that, since the New York will was void, it could not have been a factor in the compromise, is not supported by the record.[10] Further, it is a conclusion

[10] If their claim as appointees was not a factor in the compromise, decedent's brother and sisters made an incredibly good bargain. Their alternative contention was extremely tenuous. It depended upon successful maintenance of each of the following points: that the judgment barring the Cannon child from participation in the trusts was valid; that the Reno divorce of Anne Cannon was invalid, although both parties and the Cannon child were represented at the divorce proceedings, and although both parties subsequently relied upon the decree by remarrying; that decedent's marriage to Libby Holman was bigamous and the Holman child therefore illegitimate; and that, being illegitimate, the Holman child could not be called decedent's "descendant," "issue," or "child" within the gift-over provisions of the trusts.

of fact upon which the Board did not pass and with respect to which, therefore, the court below should not have made a finding. If the court considered the question material, it should have remanded the case to the Board for a finding with respect to it. *Helvering* v. *Rankin*, 295 U. S. 123; *Helvering* v. *National Grocery Co.*, 304 U. S. 282.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Acting Solicitor General.

SEPTEMBER 1941.

APPENDIX

Treasury Regulations 80 (1934 Edition):

ART. 10. *Character of interests included.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate the value of all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * * *

ART. 11. *Specific property to be included.*—* * *

* * * * * *

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder in the case the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of an interest or an estate limited for the life of the decedent. There should be included, however, the value of a reversionary interest retained by the decedent, which reverts upon the termination of a particular estate or in case of his prior death passes to others. There should also be included the value of an annuity payable to, or an interest or an estate vested in, the decedent for the life of another person who survives him. For

rules in valuing such remainders, annuities, and interests or estates *pur autrie vie*, see article 13, subdivision (10).

* * * * * *

ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised by will. * * * It should be so included if the power is exercised by deed or other instrument * * * in contemplation of death. * * * It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers included in the phrase, "intended to take effect in possession or enjoyment at or after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the value of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. * * *

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